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US EPA RECORDS CENTER REGION 5



403703

June 4, 1990

VIA MESSENGER

United States Environmental Protection Agency
Region V
230 South Dearborn Street
Chicago, Illinois 60604

Re: The Glidden Company -- U.S. Scrap Site
Proposed Settlement
Our File #34592-04001

O: ORC
CC: RF
WESTLAKE
WMD-

To Whom It May Concern:

The following comments are submitted on behalf of The Glidden Company regarding the proposed administrative settlement concerning the U.S. Scrap Site in Chicago, Illinois which recently appeared in the Federal Register, 55 Fed. Reg. 18667 (May 3, 1990). The proposed settlement is opposed by The Glidden Company because it is unfair, unreasonable and was handled in a manner so as to preclude certain PRPs from joining the settlement. The settlement should not go forward and should be renegotiated to allow all interested PRPs to participate.

If the settlement does go forward by excluding certain PRPs, the settlement nonetheless must be revised and notice must be reissued, because, as EPA representatives have acknowledged, the settlement was premised on an incorrect calculation of the amount of response costs allegedly outstanding.

Lack of Fairness and Reasonableness of the Proposed Settlement

The proposed settlement should not be approved because it is both procedurally and substantively unfair and its payment terms of \$5,100 on a per capita basis do not reasonably compensate for the harm done by the PRPs. The settlement is procedurally unfair as a result of EPA's arbitrary exclusion of several PRPs. Several of the named defendants in the cost recovery action never received notice of the proposed settlement or were never given the full and fair opportunity

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to join the settlement. Glidden appreciates EPA's preference for working through PRP committees in negotiating settlements. Here, however, some PRPs, including Glidden, which contributed \$500 to the PRP group and expected to be kept informed of settlement negotiations and events, were not kept timely informed of settlement negotiations. Instead, Glidden and other PRPs were presented with ultimatum settlements by the "Steering Committee" without ability to determine the settlement terms or the sum to be paid in order to settle. We do not believe EPA's demand for group settlements goes so far as to require a PRP's blind acceptance of unknown settlement terms, or to justify exclusion of PRPs who were not allowed to initially participate in a meaningful manner. To the contrary, EPA's insistence on accepting only "group" settlements imposes on EPA the obligation to ensure that the PRPs with whom EPA is willing to settle have not been arbitrarily or unfairly excluded from the "group." The EPA has been aware of these inequities for some time, yet has pushed forward with this settlement.

To rectify this procedural unfairness, EPA should reopen the settlement and allow all generator PRPs to participate on equal footing; i.e., by paying their \$5,100, or such other per capita amount as is necessary to meet EPA's settlement demand.*

Aside from this procedural unfairness, the proposed settlement is substantially unfair and flies in the face of the settlement principle that the settling parties should bear the cost of the harm for which they are legally responsible. U.S. v. Cannons Engineering Corp., et al., 899 F.2d 79, 87 (1st Cir. 1990) (citations omitted). Similarly, settlement decrees such as the one proposed here must be

* Many of the PRPs which were excluded from the settlement have been named as defendants in the government's cost recovery action, U.S.A. v. Standard T. Chemical, et al., No. 89 C 5730 (N.D. Ill.). If EPA does not wish to disturb the administrative settlement noticed in the Federal Register, then it is incumbent upon EPA to settle with these 14 defendants on the same per capita basis in the cost recovery action or at a reasonably graduated amount.

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reasonable, and an important facet of reasonableness is whether the settlement fairly compensates the public. Id. at 89.

In this proposed settlement, a \$5,191 per capita amount for generator PRPs, combined with less than a 15% share for the site owner and operator, does not require the settling parties to pay for their share of the harm caused and does not properly compensate the public. After applying to this Site the funds received from the Allis Chalmers bankruptcy, the \$566,332 raised by this settlement from approximately 90% of the PRPs generates merely 60% of response costs which EPA claims remains outstanding. EPA's attempt to recover the remaining costs through the cost recovery action cannot justify the settlement figure, particularly because the evidence against the named defendants is weak and the ability to recover additional funds will require significant time and expense, and it may not be successful. Thus, the settlement is substantively unfair and will not fairly compensate the public for the harm done.

Miscalculation of Proposed Settlement Figures

Should EPA proceed to finalize this settlement, it must increase the proposed settlement amount to correct an error made by EPA in calculating its claimed response costs at the time the settlement figures were established. According to the Federal Register notice, 89 potentially responsible parties will be paying \$566,332 of the remaining \$923,592 incurred by U.S. EPA, and a cost recovery action was filed against 14 defendants to recover the remaining \$357,260 in unrecovered past costs. EPA's attorney in charge of the cost recovery litigation recently admitted to defendants' various counsel that the figures announced in the Federal Register, and expressly used as a basis for calculating settlement amounts in the administrative settlement, are markedly wrong. If this is so, EPA must correct and renounce the proposed settlement. More importantly, however, if error was made in calculating the administrative settlement share based on an incorrect determination of outstanding costs, as EPA concedes it was, now is the time to recalculate the settlement figure.

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Specifically, the United States, in its most recent correspondence to defendants in the cost recovery action and in its statements before the Court, now asserts that total response costs outstanding following application of the Allis Chalmers bankruptcy proceeds equal over \$1,046,392, which raises the response costs subject to this administrative settlement by approximately \$123,000. (In other words, EPA now claims that \$480,205 in response cost will remain should the administrative settlement be accepted as proposed.) Thus, assuming this administrative settlement proceeds, the proposed settlement figures must be recalculated to account for the correct total amount of costs. If this is done, the \$566,332 settlement amount must be increased by \$123,000, or alternately, by at least \$75,400, calculated as the percentage of settlers' settlement sum divided by assumed remaining cost, multiplied by the error in calculated costs.** The remainder case subject to the pending cost recovery action would then be valued by EPA at $\$357,260 + \$47,600 = \$404,860$.

If you have any questions, I can be reached at (312) 977-9227.

Very truly yours,



Andrew H. Perellis

AHP:cc
ahp0439

cc: Ms. Mary Butler
Thomas J. Puette, Esq.
Jennifer T. Nijman, Esq.

** $(\$566,332 + \$923,592) \times \$123,000 = \$75,422$.